UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Jam Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc. and Victoria Operating Co., a single employer, Employer, and Theatrical Stage Employees Union, Local 2, I.A.T.S.E., Petitioner.	Case No. 13-RC-160240

PETITIONER'S RESPONSE TO JAM'S REQUEST FOR REVIEW

SUBJECT INDEX

TABLE OF CASES CITED

RESPONSE TO JAM'S REQUEST FOR REVIEW

Jam's request for review must be denied. The Regional Director properly found that Jam failed to demonstrate that the Union engaged in objectionable conduct that could have influenced the May 16, 2016, election. The evidence presented through two days of testimony and thousands of pages of records demonstrates no departure from the status quo, no preferential treatment or exceptions or lowering of access barriers for the Jam stagehands' receipt of referrals, no conferral of anything of value. The Jam stagehands received the referrals they could and would have received if they had come to the Union at the same time with the same availability in the absence of a representation election. The Regional Director's decision comported with the Board's existing, well-established precedents, and Jam has raised no issues warranting review.

I. Legal Standard.

Section 102.67(d) of the Board's Rules and Regulations provide that "[t]he Board will grant a request for review only where compelling reasons exist therefor." Section 102.67(d) enumerates the four grounds for a request for review:

> (1) That a substantial question of law or policy is raised because of:
> (i) The absence of; or
> (ii) A departure from, officially reported Board precedent.
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Madden v. United States Dep't of Veterans Affairs*, 873 F.3d 971, 973 (7th Cir. 2017), quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Under the clear error standard, the reviewing body "may not reverse just because [it] 'would have decided the [matter] differently.' A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017), quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). "Where there are two permissible views of the evidence, the fact find**er**'s choice between them cannot be clearly erroneous." *Carpet Serv. Int'l, Inc. v. Chicago Reg'l Council of Carpenters*, 698 F.3d 394, 397 (7th Cir. 2012).

In the present case, Jam alleges numerous instances of clear error in the Regional Director's findings, and contends that this case presents unique new circumstances heretofore unaddressed by the Board's precedents. The Board should deny Jam's request in its entirety. The Regional Director's decision was well-supported by the evidence and the Board's long-standing precedents. Jam's request raises no compelling reasons justifying review and must be denied.

The Union addresses Jam's contentions in the order in which Jam raises them:

II. The Regional Director's finding that the Union did not waive a drug testing requirement before referring Jam employees was correct.

The Regional Director properly found that "The credited evidence shows drug testing is not a per se requirement to receive referrals from the hall, and the Union only confirms whether individuals in the formal apprenticeship program have been tested." (Dec. at 5.) Tom Herrmann, the Union's former call steward, who was chiefly responsible for referring stagehands to jobs with signatory employers, testified that the Local "*tr[ies] to* get … in" drug testing before new referral hall participants are referred for the first time. (Tr. 186, emphasis added; ER Ex. 18.) The referral rules in the Local's By-Laws require participants to be compliant with "any applicable rules and programs of the JATF …, including … drug testing requirements." (ER Ex. 22 at 31-32.) But Jam did not subpoena or introduce the JATF's drug testing requirements, and the record does not disclose whether the referral rules make drug testing a *per se* requirement for all new participants.

Additionally, when asked if new enrollees in CallSteward were drug tested, Carlson repeatedly said that most are, but not necessarily all. (Tr. 286.) When asked who could make exceptions to what Jam's counsel was assuming was a *per se* requirement to test all new participants, Union Business Manager Craig Carlson corrected counsel: "I don't know that there's exceptions," he explained; rather, "I would say that folks going through the formal apprenticeship are tested." (Tr. 186.) There is an "effort" to get people tested, but the evidence was at best equivocal as to whether there is a *per se* requirement that all new referral hall participants be tested. Given these facts, the Regional Director's crediting of the testimony that there was no such requirement is far from clear error.

Ultimately, the existence or non-existence of such a policy is irrelevant, because no evidence shows that the Local waived any testing requirement for any Jam voter. As the Hearing Officer correctly noted, the record does not establish whether any Jam stagehand other than Justin Huffman or Gregor Kramer was tested. Because Huffman and Kramer were not new participants, the fact that Huffman had "never taken a drug test," (Tr. 345), is immaterial; not only is there no evidence as to how long the alleged testing requirement has existed, but even assuming *arguendo* that one existed when Huffman and Kramer first worked for a signatory employer, it was *then* that the Local waived the requirement, years before the petition. (There is no suggestion in the record that, when the Local debuted the CallSteward software system in 2015, it required all existing referral hall participants to be drug tested just in order to be able to use it.) Huffman and Kramer both testified that they did not know whether any other Jam stagehand had been drug tested. (Tr. 348, 368.) Not knowing whether one's coworkers have been tested is not the same thing as knowing that they have not, and Jam points to no basis in the record for concluding that they "must have known." Because Jam produced no evidence at all that the Local waived a drug testing requirement for any new participant in the referral hall, the Regional Director did not commit clear error by refusing to draw an inference that a requirement *was* waived on the basis of nothing more than two witnesses' claims not to know.

Similarly, Jam offers no basis for claiming that Herrmann's and Carlson's lack of knowledge as to whether the referred Jam employees were tested is incredible. On the contrary, the record contains no basis for finding such knowledge. Jam elicited no testimony as to what the drug testing process and procedure was: how are employees sent for testing; who conducts it; is there a verification process required before referrals begin; if so, who is in charge of administering it, and did Carlson or Herrmann ever receive reports on new referrals' compliance.[1] Jam cannot avoid the subject and then ask the Board to draw inferences from the lack of detail in the record. The Board must reject Jam's claim that "the only reasonable inference to draw is that the Union waived the drug test for the Shaw Voters," (Req. for Rev. at 13); there was *literally no evidence* of waiver.

[1] Herrmann testified that he was not involved in the testing process and did not typically take any steps to verify whether they completed the drug test. (Tr. 239.)

Given the lack of evidence of waiver of a drug-testing requirement, it is not the Union's burden to prove a negative. Jam's cited cases do not hold otherwise. In *Michael Cetta, Inc.*, 366 NLRB No. 97 (2018), the ALJ drew an adverse inference in a ULP case from the respondent's failure to produce documents subpoenaed by the General Counsel after being expressly ordered to do so upon denial of its petition to revoke. In *Starbucks,* 354 NLRB 876 (2009), the ALJ drew an adverse inference from the employer's failure to produce a manager's incident report when the employer instead produced a prepared statement signed two weeks later, which the ALJ concluded referred to facts the manager did not know and was not her own statement. In *Caesars Atlantic City*, 344 NLRB 984 (2005), the ALJ drew a negative inference from the General Counsel's failure to corroborate a witness' testimony about an interaction with management during an organizing drive with that of any other employees the testifying witness acknowledged were present.

The present case does not present a similar situation. Jam bears the burden of proof, described by the Board as "a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), citing *Kux Mfg. Co. v. NLRB,* 890 F.2d 804, 808 (6th Cir. 1989); *see also, e.g., NLRB v. River City Elevator Co., Inc.*, 289 F.3d 1029 1032 (7th Cir. 2002) ("When an objecting party disputes the result of a Board supervised election, there is a formidable burden upon the objecting party to prove that it was not valid").

In *Parkway Florist, Inc.*, JD-81-18, 2018 WL 6599604 (Dec. 12, 2018) (citations omitted) (adopted 2019 WL 656301 (NLRB Feb. 5, 2019)), the ALJ noted that the General Counsel had proved insufficient evidence of pretext in a discharge case. He continued:

> The General Counsel then faults the Respondent for not proving [its pled affirmative] defenses at trial, and demands an adverse inference on the subject…, but

> the General Counsel forgets that it is the government—not the Respondent—that bears the burden of proof of unlawful animus for the discharges, including proof of pretext. The Respondent's failure to prove one or another affirmative defense cannot be converted into affirmative evidence that—with virtually nothing else—proves the General Counsel's case that Vaughn's termination was unlawfully motivated. This case is a case-study of an alleged violation built on inappropriately applied evidentiary doctrines.

Parkway Florist, 2018 WL 6599604 (citations omitted). The present case is little different; it is Jam that bears the formidable burden of proving unlawful interference with the election, and the Regional Director's refusal to convert the lack of documents *disproving* Jam's unsubstantiated claims into affirmative evidence of those very claims is not clear error.

III. The Regional Director's finding that the entire Riviera crew became available to work when they were all fired is supported by the record.

The Regional Director properly found that,

> along with hundreds of other employees, former Shaw crew members, including Shaw voters, received several referrals throughout the critical and focal periods since they had registered themselves in CallSteward and were available to work considering they had been fired by the Employer and, once reinstated, were working a fraction of their previous assignments.

(Suppl. Dec. at 4.) Jam attacks this finding as "clearly erroneous," even though every single aspect of it enjoys support in the record. Obviously Jam does not dispute that it fired the entire crew of the Riviera in September 2015, the day before the Union filed its petition, and started over from scratch with an entirely new crew. But those fired employees thereby went from working however much Jam assigned them to work to not working for Jam at all. The more senior Riviera crew members went from working basically all of the shows at the Riviera to working none of them, and then after their nominal "reinstatement" shortly before the election, back to working some fraction of them. (Tr. 356.) It is only reasonable (and in keeping with their duty to mitigate damages in the pending ULP case) that the Jam employees would have sought to replace their lost Jam income.

The only real reason Jam cites for finding all of this "clear error" is that the fired Jam stagehands received some work through the referral hall in the months after they were fired, but almost none before they were fired. The *only possible inference,* Jam argues, is that the Local excluded them from the referral hall before the petition was filed, and flung open the doors afterward. Yet an equally plausible view of the evidence is that the circumstances of their mass termination made it reasonable—arguably even predictable—that many of the fired Jam stagehands would have sought work through Local 2's referral hall, and that the amount of work they received would have picked up as the Local both got busier and grew more familiar with the fired stagehands and their work.[2]

Jam's claim that work at the Riviera was "part-time and irregular" even before the mass firing does not support its claim of clear error. On the contrary, when counsel asked former Riviera Production Manager Behrad Emami, "Now, in terms of the schedule at the Riviera, is it fair to say it was sporadic?", Emami *did not agree* that this was fair: "We typically don't have shows in the summer. I mean, through the fall and spring, you know, *you knew there was consistently going to be shows*, but you didn't know if it would be two a week, *four a week, five a week*, one a week. And that varies." (Tr. 33, emphasis added.) And when asked how many shows a week, he responded that he did not know: "Two or three

---

[2] Jam's jab at the Regional Director for supposedly "stat[ing] that there were just 'several' referrals" is misplaced. (Req. for Rev. at 17.) He found that the fired Jam stagehands—just like hundreds of others—received several referrals. (Suppl. Dec. at 4.) That is, they *each* received several referrals. Given that many received a single-digit number, and no one received more than a couple dozen, "several" hardly seems like a clearly erroneous choice of words.

maybe. *I don't know. It varies.* It depends on who's touring and how the booking goes." (Tr. 33, emphasis added.) Moreover, Justin Huffman testified that, in October (at least before they were fired in 2015), work at the Aragon and Riviera could "pile up," so that the Riviera crew might work twenty or thirty days in a row, earning the month the name "Rocktober" among the Riviera crew. (Tr. 359.) There is *no evidence* in the record that Jam stagehands could feasibly have regularly sought and accepted referrals through Local 2 before they were fired, particularly given that availability to work is a factor the Union considers. (Tr. 129-30, 312.) On the contrary, Huffman would call the referral hall and be offered work but would frequently have to decline it because he was already booked for a Jam show; this happened sufficiently often that he worried about wasting the call steward's time. (Tr. 355.) There is no evidence beyond Huffman's testimony as to the feasibility of trying to feather in referrals from Local 2 into a varying and sometimes quite busy work schedule at Jam prior to September 2015. Jam did not ask Huffman or Kramer—Jam's own witnesses—why they did not seek work through Local 2 in the summers. Jam did not bring in any other employees to ask them, either. The "Shaw crew" voters were Jam employees until September 2015, and the fact that most of them never sought referrals to other employers while they still worked for Jam is hardly a fact the Union has the burden of explaining away, nor a fact from which one can draw a reasonable inference about their availability for referrals before being fired, let alone an inference that the Union previously "shut them out" of the referral hall.

Additionally, there is no evidence that any of the twenty-two eligible voters who worked at the Park West and Vic (or any of the replacement employees at the Riviera whom Jam argued were eligible to vote) ever signed up for referrals during the critical period. This is consistent with the Regional Director's finding that the Jam employees' participation in the referral system logically owed to their newfound availability, but inconsistent with Jam's theory of the case. If the Union "welcomed [Jam employees] into the hall, enrolled them in CallSteward, and began doling out referrals" as an inducement to vote for representation, (Req. for Rev. at 20), it would be nonsensical to potentially alienate the majority of voters working at the Vic and Park West by not "permitting" them to enroll. On the other hand, if signing up with the referral hall was something that anyone *could* do, but only those who had lost their jobs with Jam actually *needed* to do in order to support themselves and their families, the evidence makes perfect sense.

Moreover Jam's phrase "welcomed the Shaw Crew into the hall, enrolled them in CallSteward, and began doling out referrals" invites the reader to assume as proven facts what are merely tenuous inferences that the Regional Director properly declined to draw. What the actual evidence showed was that Business Manager Craig Carlson led half a dozen organizing meetings at Local 2's offices with Jam employees, beginning in the *summer* of 2015. (Tr. 273.) Carlson did not talk about referrals at the meetings. (Tr. 291, 339.) There "might have been" questions about how to log into the CallSteward program and set it up; ultimately, though, those questions were resolved by calling the office and talking to support staff member Christine Stephens. (Tr. 340.) There is evidence as to when precisely two Jam employees enrolled in CallSteward: Justin Huffman, who enrolled sometime after Jam fired him, (Tr. 345), and Gregor Kramer, who recalled enrolling at the same time as he signed an authorization card, although the record does not reflect when this was. (Tr. 367-69.) As for all other Jam stagehands, the record reflects only when they first received a referral, and not when they enrolled. (Tr. 134, 137, 409.)

In short, the record supports the conclusion that there is no "admission" or "entry into" the Union's referral hall, anyone may sign up with the Local for referrals, and whether they actually get any will depend on their aptitude, prior experience in the industry, availability, and how much work is available. (Tr. 128-32, 170-71, 176-77, 182, 183-84, 248-50.) The fired Jam employees sought and eventually received referrals because they had lost their jobs.[3] Because the record plausibly supported the Hearing Officer's findings, they are not clearly erroneous.

IV. The Board should reject Jam's arguments about the "discretionary" nature of referrals through the Local's referral hall.

Jam asserts that the Regional Director's finding that "the Union considers multiple factors when making referrals" is clearly erroneous, but it is amply supported by the evidence. There is a marked difference between regularly exercising discretion and judgment in assessing a variety of factors in building work crews—which is what the evidence showed—and assigning stagehands to jobs in a completely *ad hoc*, willy-nilly manner, engendering the Local's relationships with its employers—for which there is no evidentiary support.

Herrmann credibly testified that he filled calls on the basis of participants' skillsets, experience, continuity of availability (i.e. the ability to work the entirety of a multiple-

---

[3] Jam states in a footnote that the Regional Director's finding that "the Shaw crew received a fraction of the work [after being reinstated] they were offered before their terminations" is clearly erroneous. (Req. for Rev. at 18 n.9.) This is false. The only evidence on this point is the testimony of Justin Huffman, who testified that, for him, the fraction in question was $^1/_{10}$. (Tr. 355-56.) The logs kept by Emami and referred to by Jam in its footnote actually support the Regional Director's findings: Emami was expressly endeavoring to give the fired Riviera stagehands *half* the available work—*i.e.*, a fraction. (Req. for Rev. at 18 n.9.)

day job), and achieving as much parity in wages and work opportunities as possible, testimony that Carlson corroborated. (Tr. 176-77, 182, 183-84, 248-50, 297, 312.) Members generally, but not always, have some priority; membership is itself a proxy for skill, experience, and dedication to the craft. (Tr. 154, 295-96, 299.) The call steward's personal feelings about a referral participant are not part of the equation. (Tr. 251.) Employers do not want more senior, experienced people displaced by those who are new and less-experienced, and the Local does not do this. (Tr. 308-09.) The referral data provided were consistent with this testimony, as the Union argued at length in its post-hearing brief. (U. Brief Appx. A, attached hereto; Jt. Ex. 2, *passim*; U. Post-Hrg. Bf. at 24-28.)

Jam points to no evidence that Herrmann diverged from these criteria on any particular occasion. Jam is correct that there is no rotation or seniority system for filling calls; the evidence makes abundantly clear that such a system could not work for the stagehands, given the diversity of specializations and skill levels needed on every job. (Tr. 133, 168-70, 174, 176-77, 182-86, 242-44, 247-50.) Jam contends there are no "safeguards" or "controls" in place to make favoritism impossible. But it is arguably impossible to create a flowchart that could dictate the proper response to every possible exigency on every possible call; this is why the call steward exercises discretion in applying the principles above when building calls. The Local's "system" for ensuring that calls are filled according to its criteria is to have a committed, experienced individual filling the calls who knows the membership and what they can do. This necessarily means that no stagehand is "entitled" to any *particular* referral, but it does not follow that the call steward is willy-nilly filling calls "however he wants" in an arbitrary, *ad hoc* manner.

The fact that Herrmann struggled at hearing to put into words the complex series of evaluations he made every day in filling calls does not imply that he was not making them. On the contrary, the testimony that Jam itself cites shows him trying to express precisely that he *does* take these factors into account:

> It is on the availability. If they are available is where it comes up to be, and if they have some type of general knowledge. Somebody—like the gentleman said, if he just walks up and sends a resume, but I've got a choice from him or somebody who is seasoned at another venue that knows stagehand work, I would pick the guy that does the stagehand work for a living.
>
> *   *   *   *
>
> It's really hard to describe unless you see it live time [*sic*]. And if you're doing it, if you're doing it for as long as I've been doing it, it's old hat, really.

(Tr. 184-85.)

Jam alleges there is no "tracking system," no quotas, no oversight, and no true-up. (Req. for Rev. at 26.) But there is no record support for any of these assertions; Jam is assuming this is the case form the fact that the call steward exercises discretion in filling calls. Whether these "controls" exist or not, Jam's speculation that they do not on the basis of precisely no evidence cannot render the Regional Director's findings clearly erroneous.

Moreover, even if the evidence clearly showed that there were no "controls" in place, that hardly by itself "belies" Herrmann's testimony that he exercises his discretion in the furtherance of a practice of taking a variety of factors into account when building calls. A sole practitioner attorney may not have any formal set of "controls" in place governing her obligations under the professional responsibility rules, but that would hardly "belie" her otherwise credible claims that she upholds her ethical obligations in her practice.

In the face of the uncontroverted evidence as to how the call steward builds calls, Jam ultimately reverts to incredulity, decrying as far-fetched the thought that Herrmann could possibly make these judgments. (Req. for Rev. at 25.) Yet it offers no reason to believe him incapable of it. Contrary to Jam's claims, he obviously had many fewer than 1,500 participants to choose from on any given day. Once individuals are entered into the CallSteward system, they are never removed, but instead designated after a time as inactive and unavailable. (Tr. 152-53, 401-02.) Because no one is ever removed from CallSteward, Christine Stephens's statement that there were another 827 non-members and 709 members of other locals enrolled, (ER Ex. 20), necessarily includes both every new individual to sign up during the past three years and those who are currently inactive, an ever-growing list of those who permanently left town, changed their minds about being stagehands, retired, became disabled, died, moved into management, couldn't cut it and stopped getting called back, etc. Similarly, the 600-650 union members enrolled in CallSteward includes inactive members. (Tr. 169-70.) These facts are all corroborated by the fact that, during the NFL Draft event in the spring 2016 focal period, the Local called in numerous members of sister locals and consistently utilized large numbers of lesser-experienced non-members, neither of which it does when the work is slow. (Tr. 176-77.)

Also unsupported by the record is Jam's contention that it is pointless for the Local to take experience into account on most jobs because they required no advanced sills. Herrmann testified that "most everything we have needs some type of skill." (Tr. 244.). Among the employees designated simply as "hands" on employers' payroll documents (ER Exs. 10-12) or CallSteward daily call sheets (Jt. Ex. 2), it is impossible to tell from the documents alone what work they did: which were pushing crates into the arena, which were putting together the stage, which were hanging or focusing lights, which were connecting sophisticated audio equipment, and so forth. (Tr. 246-48, 289, 305-07.) A large arena show has more unskilled labor than other kinds of events, and is a good place for less experienced employees to learn by working alongside more experienced hands, (Tr. 185-86, 247-48), but that fact *presupposes* that the call steward refers a mix of more and less experienced hands to the call. Most of the larger calls on the daily call sheets just use the categories "hand," "rigger," and "head." (See generally Jt. Ex. 2.) These jobs obviously involve more than pure physical labor and rigging; all the tasks above fall in between. The fact that they are not often broken out in daily call sheets does not mean that the call steward does not take them into account in building large calls. And even assuming *arguendo* that the referral records actually showed that it was not strictly *necessary* to take skill and experience level into account, that would hardly disprove Herrmann's and Carlson's testimony that the call steward *does* rely on these factors in building calls.

Jam faults the Union for "fail[ing] to even attempt to explain how a single referral to a Shaw Voter (or anyone else) was the result of the application of any alleged "multifactor approach" or "guiding principles." (Req. for Rev. at 26.) But this is putting things precisely backwards. The Union introduced unrebutted testimony as to how it fills calls, and nothing in the referral data is inconsistent with it. This testimony more than adequately supported the Regional Director's findings, which were therefore not clearly erroneous.

V. The record supports the Regional Director's conclusion that the Jam voters received no preferential treatment.

The Regional Director's finding that the referral data did not show preferential treatment for Jam voters during the critical or focal periods was not clearly erroneous; on the contrary, the data plausibly support his findings in each of the specific ways addressed by Jam in its request for review.

A. The referral numbers show no preferential treatment for Jam voters as compared to similarly situated referral hall participants.

The Hearing Officer's judgments as to which other referral participants to compare with the Jam voters, adopted by the Regional Director, were supported by the evidence. His valid comparison demonstrated that there was nothing in the rates of referral of the Jam voters during the focal period permitting an inference that, contrary to the credited testimony of Herrmann and Carlson, the Local referred them to jobs they would not have worked but for their status as Jam voters.

Jam includes in its list of comparators thirty members of other locals who first worked through Local 2 during the critical period. These individuals are not comparable. They may well include long-experienced journeymen in their home locals; they are unlikely to be new to the craft or new to the IATSE, and in any event Herrmann's testimony was that they were referred only in the very busiest situations. (Tr. 176.)

It was also sensible to exclude from the comparison those with *no* work during the focal period. Those who actually received referrals were obviously available. It is less obvious that those who received none, despite the Local being busy enough to call in members of other locals, were also available. Some non-members with work start dates in the critical period but no Jam affiliation (Campos, Dimery, Harvey) received in excess of twenty referrals during the focal period, while others received half a dozen, and still others received zero. (Jam Br. Appx. Att. 8.) Given these large discrepancies *among* the non-Jam participants, there is no basis for inferring that the large group with zero referrals were bypassed in favor of a handful of *Jam* stagehands. Including, for the sake of argument, the thirty members of other locals among the comparators, Jam's Appendix 8 shows eighty-two non-Jam employees receiving at least one initial referral in the critical period but none in the focal period (*i.e.* those with a zero in the right-hand column of the attachment). Using Jam's own numbers of 129 referrals to voters and 294 referrals to "comparators," the Local passed over these eighty-two non-Jam stagehands to refer work to *other* new, *non-Jam* stagehands 294 times, more than twice as often as it passed them over in favor of Jam stagehands. Given these facts, the most logical inference—or at least *a* logical inference—is that these individuals were not referred for reasons unrelated to the Jam election, and simply were not part of the Local's active workforce during this period and should not be counted in the comparison.[4] The question is, among those *working* during the focal period, did non-voters work materially more than voters? As the Hearing Officer's analysis aptly demonstrated, the answer is "no."

As the Union argued in its post-hearing brief, there are other instructive comparisons. If one compares the Jam stagehands who were not offered Union membership in the fall of 2016—*i.e.* the less-experienced Jam stagehands—with non-Jam stagehands with work start dates on or after September 2015, the non-Jam stagehands averaged 7.45 referrals per person during the six-week pre-election period, very similar to the Jam stagehands, who averaged 6.74 referrals per person during the same period. (U Appx. A.) And while *on average* the eligible voters among this group received a couple more referrals

[4] Jam asks the Board to infer that these individuals "coveted more referrals" and "clearly were qualified," (Req. for Rev. at 29), although it is equally possible that these individuals tried working a job or two and quickly realized they were not cut out for, or did not like, the work. The conclusions drawn from the data by the Regional Director are at least as plausible as those urged by Jam, with the result that no clear error can be found.

each than the non-voters, the numbers are too widely distributed to show disparate treatment: three of the ten non-voters—Dan Alvarez, James Bartolini, and Aleks Dombrovskis—received ten or more referrals each, and four of the nine voters—Todd Carter, Bryan Mangnall, Michael Mulvey, and Brad Sikora, received four or fewer. (U Appx. A.) While the Hearing Officer declined to rely on this comparison, it nonetheless lends credence to the Regional Director's finding that the Jam stagehands received no more work than they would have absent the organizing campaign or the pending election.

B. The fact that "all twenty" voters were referred during the focal period does not imply clear error by the Regional Director.

The fact that all twenty of the forty-three eligible Jam voters who signed up for referrals got some during the focal period does not imply that they received them because their status as voters. On the contrary, it corroborates Herrmann's and Carlson's uncontradicted testimony that when the referral hall gets busier, as it unquestionably did during the focal period, less experienced referral participants are more likely to get work.

This testimony is further corroborated by the fact, elided by Jam, that, among the ten ineligible Riviera employees who signed up to receive referrals, six received their first referrals during the focal period. Yet surely Jam would not argue that the Local targeted them because of the upcoming election; they were ineligible. Indeed, of the 121 individuals identified on Jam's Appendix Attachment 8 as having a work start date during the critical period who were *not* Riviera discriminatees, sixty-seven have work start dates in April and May. This, too, presumably had nothing to do with the election, and everything to do with the fact that the Local needed bodies to staff jobs in a busy period.

The Union has never denied a sharp uptick in referrals among the Jam stagehands during the focal period. As explained on the record and corroborated by the data, things got busy during the focal period when the NFL Draft came to town. (Tr. 253-55, 304-05.) Those with less experience and history with the Local get comparatively fewer calls when things are slow, and have more opportunities when things are busy. (Tr. 133, 170-71.) This explains the sharper increase in referrals for the non-voters, who were less experienced—at least at the Riviera—and the voters, who were more experienced.

Finally, Jam ignores another fact: the voters' referrals fell off just as the election approached. In the last nine days of the focal period, they received a total of nine referrals. (Jam Appx. Att. 5.) In the last six days, there were just four, all worked by the same individual, and in the last two days, there were none. (*Id.*) This, too, is inconsistent with Jam's theory that the Local was pushing aside other individuals to refer Jam voters for work, but it is consistent with the fact that the NFL Draft had left town, and things went back to normal springtime work levels, not to pick up again in the summer.

In short, the fact that "all twenty" of the forty-three eligible voters were referred during the focal period does not render the Regional Director's decision clearly erroneous.

C. The fact that Justin Huffman received twenty referrals during the focal period does not imply clear error by the Regional Director.

The Regional Director properly rejected Jam's argument that the fact that Justin Huffman was referred more than the other Jam voters required setting aside the election. From two undisputed facts—(1) Huffman was the Union's observer during the election, and (2) he received twenty referrals during the focal period—Jam urges an inference that "he clearly was targeted and favored because of his role in the organizing campaign." But *there is no evidence in the record of Huffman's role in the organizing campaign*. Jam also overlooks the fact that Jam called as its own witnesses the Union officers who referred Huffman. If *Jam* chose not to ask them why they referred Huffman, that can hardly result in an adverse inference *against Local 2*.[5]

The premise of Jam's argument—that the number of referrals Huffman received is a remarkable fact needing an explanation—is faulty. The following non-members whose first work for the local (unlike Huffman, who had received work occasionally for years prior) came during the critical period received at least as many referrals as Huffman: Jose Campos (21), Aileen Dimery (20), Jose Villapando (26), and Jonathan Harvey (27). (Jam Appx. Att. 8.) The following individuals who were made Journeymen at the same time as Huffman and thus reflected similar levels of experience and skill were referred at least as many times during the focal period: Ballard (40), Bridges (36), Bruton (27), Cleary (22), Kernan (25), Lazaris (28), Principe (32), and Robinson (22). (U Appx. A.) In short, there is nothing particularly remarkable about the number of referrals Huffman received during the focal period, particularly in light of his experience and history with the Local.

Finally, it is a red herring to imply that Huffman's prior industry experience was irrelevant because he was referred to general "hand" positions. Herrmann and Carlson testified that individuals with more experience, skill, and a demonstrated track record were more likely to be referred *in general*. (Tr. 128-32, 170-71, 176-77, 182, 183-84, 248-50.) This makes intuitive sense, as already discussed above: a job—even a large arena job or

[5] Jam derides Huffman's testimony that he did not know why he was picked the most as "convenient." (Req. for Rev. 32.) Given that Jam elicited no testimony about Huffman's knowledge of the Union's referral criteria or process, it is unclear why it finds his denial incredible.

the NFL Draft—is going to run more smoothly and efficiently with a critical mass of experienced stagehands and can serve as an on-the-job learning experience for the less-experienced only if there are more experienced hands working the job to learn from. If Jam's unfounded skepticism of this testimony were correct, the Local could fill a call at the United Center with fifty general hands who had never worked a day as a stagehand in their lives, and the stages would be built, equipment unloaded and installed, lights hung and focused, sound equipment connected, and so forth. This, frankly, is implausible.

The Regional Director's failure to draw sweeping inferences from the fact that Huffman received twenty referrals in the focal period was not clear error.

D. The existence of a list of Aragon crew members does not imply clear error by the Regional Director.

Jam's argument that the existence of a designation in CallSteward identifying members of the "Shaw Crew" created "an easy way for Local 2 to target and favor members of the Shaw Crew for referrals" has a gaping flaw. The Regional Director found that the Union maintained such lists to refer particular crews dedicated to particular venues to particular jobs[6]—but, Jam claims, the union signed its first collective-bargaining agreement with the newly-organized Aragon Ballroom (also staffed by the terminated Riviera crew) in July 2016, after the election. (Req. for Rev. at 33 n.14.) The flaw is that there is no evidence in the record of when this "list" was created. Counsel never asked when the list was created, and Herrmann's testimony was unclear: "They might have been categorized

[6] Jam does not contest this finding, and it is well-supported in the record. Such designations appear in the referral records in other instances, such as the Goodman, where a venue has a designated in-house crew that the venue has hired itself, rather than simply receiving whomever the Local sends. (Tr. at 205, 292-93, 391.)

in the list as far as availability. It could have been Shaw crew list, Aragon crew list. I don't remember at the time." (Tr. 206.) When counsel proceeded to ask whether Herrmann kept separate lists of "regular" and "non-regular" Shaw crew members, Herrmann stated that separate lists were created after the organizing drive when some of the former Jam employees were made members and placed on the list of members. (Tr. 206.) At that point, counsel moved on rather than trying to clarify further. It is therefore far from clear on the record that such a list even existed before the organization of the Aragon crew.

But even if it did, as the Hearing Officer properly found, (H.O. Report at 10 n.11), it is not exactly surprising—or suspicious—that the Local, while attempting to organize a workplace, would keep a list of who worked there. The fact that a list exists does not prove the Union used it for any improper purpose, and there is no actual evidence in the record that the Local ever relied upon this internal classification in referring voters during the critical period. Indeed, the evidence does not suggest that the "list" in this case contained only those eligible to vote in the Jam NLRB election, and Herrmann credibly testified that he was not involved in the organizing campaign and did not even know who the eligible voters were, and that their status as Jam employees did not cause them to receive more referrals than they otherwise would have. (Tr. 251-52.) The Regional Director was correct not to draw any inferences from the existence of the list.

E. The fact that some of the eligible Jam voters were referred to some of the same jobs does not imply any special or different treatment.

Contrary to Jam, the fact that, on a handful of busy days, multiple Jam voters appeared on the same calls is woefully insufficient to draw the wild inference that Jam seeks: that this happened only "because it was an easy and convenient way to make sure the voters received referrals during the focal period and the voters would see that the Union conferred premium work to their friends and colleagues." (Req. for Rev. at 34.) As the Hearing Officer noted, the question before the Regional Director on remand was not *where* the Jam voters worked, but whether they received referrals they would not otherwise have received but for the pending election. This "grouping," as Jam called it, supports no inference of impropriety, as the Regional Director correctly found.

Like a conspiracy theorist trying to impose patterns that aren't there, Jam's focus on "grouping" overlooks a number of other relevant facts. For instance, eligible Jam voters were *not* grouped together for single events on thirty out of forty-five days during the focal period. (Jam Appx. Att. 5.) Of the fifteen days on which Jam claims the voters were "grouped," seven of them involved "groupings" of just two or three eligible voters, which could easily happen even if the referrals had been distributed completely randomly. (*Id.*)

But the data for the dates on which larger "groups" of voters worked the same event are no more suggestive of any impropriety. On May 2, Jam voter Paul Wright worked at the Imperial Ballroom for the Travis AV event, and Gabriel Thomson worked at the Island Bleacher Build. (Jt. Ex. 2 at 1892, 1923.) Bryan Mangnall worked the SalonCentric National Sales Meeting. Fourteen other Jam voters worked at the NFL Draft Week Strike, part 2. (Jt. Ex. 2 at 1919-21.) There were 107 stagehands referred to that event (separate from another Draft-related referral at the Auditorium), constituting nearly a quarter of the stagehands the Local referred that day. (Jt. Ex. 2 at 1892-1924.) Given the undisputed testimony about less-experienced stagehands being more likely to be referred to larger events like the NFL Draft, it is simply unremarkable that fourteen of seventeen of the Jam voters referred that day wound up on that event. The same pattern recurs in the focal period: when larger numbers of Jam voters are found at the same event, it is at the one event that dominates the calendar that day. For example, on April 25, fifteen of the forty-three eligible Jam voters worked "NFL Draft Week 3 pt 1"; in total the Local referred 203 stagehands to that job out of a total of 461 for the day. (Jt. Ex. 2 at 1664-95.) Of the non-voters whose first work date was in the critical period, thirteen out of sixteen also worked that job. Again, in light of the testimony, it is entirely unsurprising that the relative neophytes were all referred to the large outdoor job.

Jam also again complains about the shortcomings of its own witnesses' testimony: "no explanation was provided as to how or why Local 2 chose to group the voters together for referral to the same events." (Req. for Rev. at 34.) Jam's failure to ask its own subpoenaed witnesses Herrmann and Carlson about these "groupings" that appear in the referral data cannot be the basis of an inference *in Jam's favor*. But even if one credited Jam's conclusion despite the lack of support in the numbers—that the "groupings" are statistically unlikely and therefore plausibly indicate the call steward's intent to group voters together—then so what? Jam cannot with a straight face contend that "grouping" potential voters on the same job instead of referring them to different jobs confers a benefit on or sends some improper signal to those voters. There is no indication on the record that the Jam voters as a group like each other or enjoy working together any more or less than any other group of coworkers. At the same time, there may well be a good reason for deliberately grouping Jam voters, such as a history of working together; absent deliberate grouping, there may be a logical explanation for why they were grouped, such as that working outdoors on tearing down stages and venues was the least desirable job that the lowest individuals on the totem pole were assigned to; or it may simply be happenstance that the largest number of employees were assigned to the largest job.

Leaving aside whether these supposed "groupings" depart from what one would expect, Jam cannot explain why, in analyzing whether Jam voters received special treatment, it matters whether fifteen of forty-three eligible voters all worked the same event or worked fifteen different events. The question is whether Jam voters received referrals that they would not otherwise have received but for their status as Jam voters. Perhaps if the daily call sheets showed that certain jobs were consistently, day after day, filled only by journeymen, and then suddenly inexperienced Jam voters (and no other inexperienced new referral participants) were staffing those jobs during the focal period, one could argue that the data indicated a departure from the status quo. But instead they are perfectly consistent with what the Union explained was the status quo, and they do not suggest that the Jam voters received referrals they otherwise would not have.

F. The "grouping" of voters is no more significant at the David Gilmour show than any other.

Jam is correct that the Regional Director did not specifically address the David Gilmour show in his Supplemental Decision. But that does not amount to clear error, as the argument is yet another untenable inference. Jam notes that "all 12 voters confirmed their referrals on April 4[7] between 2:13 p.m. and 3:27 p.m., just the afternoon before the load-

[7] April 4 is three days before the Regional Director approved the settlement, over the Union's objections. But, as Jam is well aware and the Region's own records obviously show, the timing of the election was not determined until the Union waived any claim that the as-then still unremedied ULPs could constitute grounds for setting aside the election, which occurred on April 20. Had the Union chosen otherwise, the election could not have occurred until the completion of the sixty-day notice-posting period, *i.e.* sometime in June.

in the next day," (Req. for Rev. at 35), implying that the Union held open a dozen spots out of fifty-eight on the call for the David Gilmour show until the last moment, risking a delay in the load-in of the show during a two-day period when stagehands would also be needed for shows by Iron Maiden, Iggy Pop, and Meat Loaf, (Jt. Ex. 2 at 1277-97), just in case the Region approved the Jam settlement over the Union's objections and scheduled the election shortly thereafter. (Jt. Ex. 1 at ¶ 7.) Of course, the election date was not set until four weeks later. If anything, the timing suggests a last-minute scramble to fill open positions, precisely the kind of situation in which Herrmann might logically turn to a known group of unemployed stagehands to quickly fill a call. Perhaps if Jam had asked Herrmann about it, the record would reflect why this "grouping" appears in the data, but it did not. Jam's claim that the Jam stagehands were not referred to the Gilmour show because of their skillsets, (Req. for Rev. at 34), also appears false; seven of them show an indication in the "Notes" column on the daily call sheet that they were working as rigger/carpenters, and another worked as an electrician. (Jt. Ex. 2 at 1228, 1231-32.)

The question, then, is whether the fact that a small group of unemployed Jam stagehands, most with rigging, carpentry, and electrical skills, being referred as riggers/carpenters and electricians as part of a last-minute effort to fill calls over a two-day period when at least three other rock shows were going on is consistent with only one conclusion: that they would not have received the referral (or any other) but for their status as voters in an election that had not yet been scheduled, pursuant to a settlement agreement that had yet not been approved. The question answers itself—the Regional Director's finding was not clearly erroneous.

G. The "grouping" of voters at the Rihanna show is also insignificant.

Like the Gilmour concert, the April 15 Rihanna show at the United Center, far from being an anomaly begging for explanation, on the contrary serves to corroborate Herrmann's testimony about how referrals are made in the ordinary course of the Local's operations, and nothing in Jam's request for review suggests that Regional Director should have found any differently.

First, Jam is wrong to claim that April 15 was "not particularly busy." April 15, at 433 referrals, was seventy percent busier than the average of 254 referrals over the first fourteen days of April, and exactly 100 people busier than the average of 333 throughout the focal period. (Jam Appx. Att. 5.) Out of the 433 stagehands referred to jobs on April 15, 123 were referred to the Rihanna show, exactly the kind of show where Herrmann testified he placed newer employees for them to gain experience. The fact that, as Jam points out, few Jam voters had been offered work at United Center in the fall and winter, far from contradicting Herrmann's and Carlson's testimony about how referrals are made, corroborates it: far fewer less-experienced stagehands got work in the slower season. This is exactly what one would expect to see given Herrmann's and Carlson's testimony.

Because the referrals to the Rihanna show viewed in context corroborate, rather than contradict, the testimony of Herrmann and Carlson about the guiding principles under which referrals are made, the Hearing Officer was correct in declining to draw the negative inference that the thirteen of forty-three eligible Jam voters who were referred to that event received their referral because they were Jam voters as opposed to receiving them in the ordinary course of the referral hall's operations, and the Regional Director was correct to leave this finding undisturbed. It is not clearly erroneous.

There are two ways Jam could try to prove its case that the Union lowered barriers to access and gave the Jam voters referrals they would not have received but for the pending election. First, it could offer direct evidence that particular voters received particular referrals that, in the ordinary course of the referral hall's operations, would have otherwise gone to someone else. There is no such evidence in this case. Indeed, absent some specific recollection by the call steward or specific evidence that a Journeyman or more senior, experienced individual was interested in working and available to work on a given day but denied the opportunity to do so because that opportunity was instead given to a Jam voter, it is all but impossible to say now, over three years and presumably hundreds of thousands of referrals later, that any particular referral on any particular day would have gone to someone else but for the pending election.

Thus Jam turns to the second alternative: trying to demonstrate anomalies in the overall referral numbers in an attempt to show that the Jam voters received disproportionate referrals, giving rise to an inference that the disproportionality results from a lowering of access barriers to the Jam stagehands. (Of course, as we have seen, the data do not support these conclusions at all, but actually corroborate the Union's testimony as to its referral practices.) Under this approach, the number of Jam voters working on a particular day or at a particular venue is just another data point in the larger set, whether that number is a large one or a zero. The fact that a larger number of Jam voters worked the Rihanna concert on April 15 is no more inherently significant than the fact that no Jam voters worked the James Beard awards event on May 1. (Jt. Ex. 2 at 1882-86.) What is significant is the overall trend: when the Local got busy in April and May of 2016, the Jam stagehands—like hundreds of other stagehands—got more work. When things stayed busy into the summer of 2016, long after the election was over, they continued to get work. In this larger context, *which* days they worked simply is of no consequence. The Regional Director's refusal to draw the inferences Jam urges from the handful of days, including the Gilmour and Rihanna concerts, when multiple Jam voters worked the same shows, is not clear error, particularly in light of the overall patterns described above.

It is just not the case that the only possible inferences to draw from the broader data are that the Union gave the Jam voters special treatment and thus that the Union's witnesses were lying about how the referral program works. Because the inferences Jam asks the Board to draw are not supported by the evidence—and certainly not the only plausible inferences one could draw from the evidence—the Regional Director's refusal to draw them was not clear error.

H. The referral patterns for eligible vs. ineligible Jam employees are not probative.

The Regional Director correctly adopted the Hearing Officer's refusal to infer that the Union gave Jam voters special access to referrals based on their voter status from the fact that they received more referrals than ineligible Jam employees. Jam is yet again claiming that facts that are actually consistent with the testimony about the operation of the referral hall are instead anomalous.

First, Jam's contention that there is a sharp distinction in the referral numbers between voters and non-voters is overstated. Jam's numbers from Appendix Attachments 1 and 3 show six eligible voters who were offered eight or fewer referrals during the focal period: Carter, Mangnall, Mulvey, Peterson, Sikora, and Thomson. At the same time, five ineligible Jam stagehands were offered nine or more referrals during the same period:

Alvarez, Bartolini, Dombrovskis, and Fritz. (Jam Appx. Att. 1, 3.) But under Jam's theory, there was no reason for the Union to have offered the ineligible group any work at all while denying opportunities to the voting group.[8]

Additionally, as argued in the Union's post-hearing brief, it is noteworthy that 136 of the 215 focal-period offers went to the ten individuals who were made journeymen in the fall of 2016, averaging 13.6 offers each. (U Appx. A.) The relevant comparison to similarly-situated peers is not with other Jam employees who had always worked far more sporadically than them, even while they all still worked at the Riviera, but rather with other non-Jam stagehands who were receiving referrals at the time and were also made journeymen later in the fall of 2016, well after the Jam election. As shown in the Union's post-hearing brief, the Jam employees received fewer referrals on average than the other 2016 journeymen initiates, not more. (U. Post-Hrg. Br. at 27.)

In addition to glossing over these context-giving numbers, Jam faults the Regional Director for not ignoring the evidence in the record that contradicts its claim that skill and work experience play no role in referrals. But the record is clear that the non-members—both those who were and were not affiliated with Jam—who were made journeymen in the fall of 2016 on the basis, as Herrmann and Carlson testified without contradiction, of precisely their skill, experience, and demonstrated dedication to the craft, (Tr.

---

[8] Jam's explanation in its request for review—that the Union gave ineligible voters work to provide cover to make its "scheme to influence the voters" less obvious—is laughable. Jam is arguing that a large disparity exists, and it is evidence of a scheme to influence the voters—*and* that the disparity is smaller than it could have been, and this is *also* evidence of a scheme to influence the voters. If there had been no disparity at all, presumably that would have been evidence of the Union's perfect cover-up of its scheme. This is classic conspiracy theory reasoning; it obviously has no support in the actual factual record.

154, 295-96, 299)—worked more than the non-members with less experience. As the Hearing Officer pointed out, the same pattern held at the Riviera before the organizing campaign began—it was precisely the number of shows worked that determined eligibility to vote—and thus all of the Jam employees who became journeymen were in the voter group. While Huffman used to arrange his life around Jam's calendar of upcoming events because he worked every single one of them, the ineligible Jam employees worked fewer than eighteen shows in the entire year (less than about once every three weeks), despite for much of the year Jam running as many as four or five shows a week. (Tr. 33, 356.) While Jam contends that "the record does not show that the voters were more experienced than the ineligible members of the crew," (Req. for Rev. at 38), on the contrary the *only* evidence in the record of their relative experience is the number of shows they worked at Jam as reflected in their eligibility to vote.

VI. The Regional Director's finding that the referral of the Jam voters was consistent with the normal operation of the Local's referral hall is plausibly supported by the evidence and not clear error.

Jam again alleges that there "is no 'normal' operation" of the Local's referral hall because of the degree of discretion employed by the call steward in meeting the multifaceted, varying requirements of building calls. But as argued at length above, it does not follow in any way, nor is there evidence to suggest, that Herrmann did not follow the criteria he identified in his testimony when he built calls.

Jam proceeds to fault the Union for not presenting specific evidence as to why specific stagehands had been referred to specific jobs, observing that it had submitted an offer of proof that included its allegations that "a large number of Shaw voters" were referred to the David Gilmour and Rihanna shows. But the fact that Jam averred in its offer of proof that "groups" of Jam voters worked the Gilmour and Rihanna shows does not make that fact relevant (it is not relevant, for the reasons discussed above). As noted above, Herrmann and Carlson were *Jam's witnesses*. If it wanted to know how they made individual referral decisions, it should have elicited that testimony, and its failure to do so can hardly be the basis of an inference in Jam's favor.

A. Nothing about the amount of available work suggests the Jam stagehands received work they otherwise would not have.

The evidence plausibly supports the Regional Director's finding that the increase in referrals to the Jam voters in the focal period was explained by the increase in available work through the referral hall. The Union officers' testimony was uncontradicted and is corroborated by the referral data, as argued at length above and in the briefing to the Region. The cases cited by Jam do not require a different conclusion. In *Knightsbridge*, the ALJ rejected testimony regarding an alleged prior history of union misconduct that "was not predicated upon first-hand knowledge or observation, was uncorroborated by other evidence and was frequently nonspecific and conclusory." *Knightsbridge Heights Rehab. Care Ctr.*, 352 NRLB 6, 11 (2008). In *Leisure Centers*, the ALJ rejected the testimony of the executive and regional directors of an assisted living facility that they were concerned that "medical intervention" by an employee could expose the company to liability because, "like most of their testimony, it was conclusory, unspecific, and unsupported by probative documentary or other evidence," but also could not explain why it was necessary to fire an employee for taking a resident's pulse during an emergency call. *Leisure Centers, Inc.*, 326 NLRB 1215, 1218 (1998). In both cases, the ALJ rejected a respondent's conclusory, uncorroborated evidence in support of its defenses to liability for unfair labor practices where the General Counsel had sustained *its* burden of proving that the ULPs were committed. In the present case, that burden belongs to Jam, and the testimony it attacks as "conclusory" is predicated on first-hand knowledge and observation of the referral program's workings, is corroborated by the data, and is opposed by no contrary evidence. Given that the heavy burden of proof is Jam's, and given the lack of any evidence supporting Jam's allegation that voters were given referrals they would not have received but for their status as voters, the Regional Director's finding was not clear error.

In opposition to this testimony from people in a position to know, testimony that was not impeached, contradicted, or called into doubt by other evidence, Jam is the one offering the conclusory assertion: "The six-week period before the election on May 16, 2016, was not a particularly busy period." (Req. for Rev. at 40.) Its only purported evidence is that "there were no outdoor concerts or festivals." (*Id.*) But if the summer is busy because there are outdoor concerts requiring 150 stagehands and Lollapalooza requiring 200 stagehands a day for a three or four-day festival, then a month featuring the NFL Draft, which used more stagehands for a longer period of time than any of these, deserves the same label. The Union does not dispute that summer is the busiest time. But the Union never claimed that the Jam stagehands started receiving more referrals in April because it was the busi<u>est</u> month of the year, only that being referred comparatively more in April than in the slow winter months was consistent with it suddenly getting much busi<u>er</u>.

Jam's other conclusory assertion is that "the Fall is generally a busy period," for which it cites the testimony of Justin Huffman. (Req. for Rev. at 43.) But when Huffman testified that "you could work 20 to 30 days in a row in October," (Tr. 359), he was obviously and specifically referring to past years at the Aragon and Riviera to explain why the Riviera stagehands referred to October as "Rocktober." (Tr. 359.) That trend obviously did not continue for them in 2015: "No, we were fired, yeah." (Tr. 359.) Nothing in Huffman's testimony establishes any basis for concluding that, *for the Local 2 referral hall*, fall is so busy that one would have expected higher numbers of Jam voter referrals.

It may well be that, absent the NFL Draft in April and May, the Jam voters would not have started to see referrals in significant numbers until the high summer season. But the election did not take place in that alternate, hypothetical universe; it took place in 2016, when the Local was referring stagehands to work the draft in numbers exceeding what Lollapalooza requires. Even assuming *arguendo* that April "*can be* slow" for the Local 2 referral hall, that hardly implies that it *was* slow in 2016 with the NFL Draft in town.

Jam next doubles down on the analytical mistake it makes in its arguments about "grouping" voters, noting that sometimes more Jam employees are referred on less busy days. Even if this is true, it does not change the evidence that the busier the Local became overall, the more likely that, operating according to the referral principles described in the testimony, Herrmann would go lower on the totem pole of experience to fill calls. What we expect to see given Herrmann's testimony is that the lesser-experienced participants will get very little work in the slower seasons, and significantly more work in the very busy seasons; and the more experienced one is, the less this discrepancy in work opportunities between slow and busy times will be. The referral data for the Jam employees who worked through the referral hall show precisely this pattern. Jam does not support with any evidence its theory that there is some precise mathematical correlation between the Local's busy-ness on each and every day and the number of referrals that participants of a particular experience or skill level get on those precise days, and thus there is no evidence that the Jam voters' referrals were an aberration from such a pattern. At the same time, the referral patterns are consistent with the Union's testimony about how the referral hall operates and with the uncontradicted, credible evidence in the record about the comparative busy-ness of different times of year and the extraordinary burdens placed on the hall by the 2016 NFL Draft.[9] The Regional Director's conclusion that this testimony explained the referral patterns is not clearly erroneous.

Jam's fallback position from these conclusory allegations is that "even if the Draft referrals are removed from the count, there was still a substantial increase in the number of referrals of voters during the focal period." (Req. for Rev. at 42.) But what Jam means is, "even if the referrals of Jam voters to the Draft are removed from the count of referrals of Jam voters during the focal period, there was still a substantial increase." This is to be expected with the Draft in town, because hundreds of stagehands were working the Draft almost every day, reducing the number of stagehands available to fill calls for other events, including a number of large arena shows themselves requiring upwards of 100

[9] The evidence that Local 2 came close to exhausting the pool of *active* and *available* stagehands, and that there were *not* "plenty of stagehands available to handle the work load," (Req. for Rev. at 42), is that the Local started calling in significant numbers of stagehands from other locals, which the uncontroverted testimony established generally happened only in an "all hands on deck" situation. (Tr. 176.)

stagehands. If we want to know what the referral numbers would have looked like without the NFL Draft in town, we need only look back to the winter months preceding it or the late spring months following it, when referral rates for Jam voters were lower.

The Riviera stagehands did not work the 2015 NFL Draft, when they remained employed by Jam. Jam called two Riviera stagehands as witnesses—Huffman and Kramer—but it never asked them why they didn't work the 2015 Draft, if they had wanted to or tried to work it but been denied, or if they had even been available to work it and, if not, why not. Herrmann did not recall whether the Riviera stagehands worked the 2015 NFL Draft or not, (Tr. at 262), which itself tends to show that he was not focused on this one small group of stagehands in handling the massive number of moving pieces necessary to staff something like the Draft on top of April's regular schedule of events. Jam simply asked Carlson whether, with respect to the Draft, "in 2015 Local 2 did everything like it did in 2016?" and he answered, credibly and without contradiction, "I believe so, that's right." (Tr. 321.) The only difference between 2015 and 2016 was the availability in the referral pool in 2016 of an additional small group of stagehands with relevant industry experience who were not there in 2015 because they had another job.

The presumption at the heart of Jam's argument is that no Jam stagehand is eligible for *any* referrals, ever, and therefore so long as there was someone—anyone—else to whom the referral could have been given, the explanation that the number of referrals to Jam stagehands increased when things got busier must be bogus. That is, Jam's argument starts with a presumption that the thing it is trying to prove is true. As argued at length both above and to the Region, there is no evidence in the record of any barriers to either participation in the referral program or receiving referrals that were lowered for the Jam stagehands, either before, during, or after the critical or focal periods.

What the consistent, credible, uncontradicted evidence shows is that things got busy in April and May 2016, and that stagehands, including fired Riviera stagehands, with lesser experience levels got referrals they were not getting in the winter when it was less busy. The increase in referrals seen by the Jam stagehands—including the larger increase seen by the less experienced Jam stagehands—is not evidence that they were being given access to referrals that they would not have received but for their status as voters, but on the contrary evidence that the Local was operating the referral hall as it always did. The Regional Director's acceptance of this plausible view of the evidence was not clear error.

B. The Jam voters' skillsets are consistent with the referrals they received.

As discussed above in Section IV, the fact that the Jam voters may have been referred primarily to general "hand" positions is not inconsistent with Herrmann's testimony that lesser-experienced stagehands tend to get less work until things get busier.

Jam's response is to call into question Herrmann's testimony altogether, arguing that it is just impossible that the call steward could have any idea as to who had more or less experience or skill when building calls. But Jam does not explain why someone who spends hours every single day, day after day, building calls from the same pool of active participants, would not develop deep familiarity with the skills, training, experience, and aptitude of a group of several hundred individuals, particularly with the reinforcement of CallSteward making their availability and specific skills available to him at the touch of a button. On the contrary, this seems probable. Herrmann did not claim that he under-took some extensive, detailed analysis to determine whether each applicant was the perfect, optimal fit for each slot on each job; indeed, given the scope of his daily task, the perfect would quickly become the enemy of the good. Rather, Herrmann's uncontradicted, credible testimony was that the call steward, looking at the individuals displayed as available on any given day, along with their skillsets, can fill calls consistently with the principles he testified to; he knows whether someone has been around for three years successfully working calls and developing a skillset, came into the local more recently but with relevant industry experience, is right out of college with relevant coursework, or is straight off the street and completely green.[10] (Tr. 184-86, 247-49, 296.) Herrmann struggled to articulate exactly how he fills calls because it is a complicated job that one has to work into and develop an intuitive feel for: "It's really hard to describe unless you see it live time [*sic*]. And if you're doing it, if you're doing it for as long as I've been doing it, it's old hat, really." (Tr. 184.) As he explained to the hearing officer when asking how he even knew where to start, Herrmann said, "Well, it's just through my experience in doing it, and doing it well." (Tr. 180.) Many jobs appear impossible to someone who has never done them. But to someone who has worked in the industry for decades, knows the referral participants, knows the employers, knows the industry and what's involved in doing the various jobs, it may be challenging and harried, but far from impossible.

---

[10] As argued previously, it is also not "pointless" to make these distinctions, even when filling a call at a large arena show; a job would surely run very differently with 100 completely green stagehands on the floor trying to unload trucks, assemble stages, install equipment, hang and focus lights, etc. than with 100 journeymen; work at any skill level can be done better or worse, with more or less efficiency, and Jam, which promotes arena shows, cannot possibly be ignorant of the complexity of putting together such an event, let alone one on the scale of the NFL Draft.

Additionally, the Hearing Officer properly examined the period of time after the "focal period" because the overall arc of referrals, beginning in the fall of 2015 and continuing into the high summer season of 2016, showed a larger pattern, both before the election and after, that was entirely consistent with the testimony about how the referral hall operates. If the Local's purpose in referring the Jam stagehands had been to entice them to vote for representation, there would have been no reason to continue the referrals once the election was over.[11] Instead, they continued to follow the same pattern, tied in volume to the ebb and flow of available work. Because the referrals before, during, and after the focal period were *all* consistent with the Jam voters being referred in the ordinary course of the referral hall's operations, Jam's theory that its stagehands would not have received the referrals they received in the focal period but for the pending election is undercut.

Jam's fallback position—that the six weeks following the election were "truly a busy period yet the number of Shaw Voter referrals dropped" (Req. for Rev. 45 n.20)—is concocted out of whole cloth. Jam's case for a "truly busy" post-election period seems to be based on a handful of arena and outdoor shows that took place in the late spring and early summer. But arena shows, which require nearly as many stagehands to put on as an outdoor show, were going on throughout the focal period, as well, in addition to the larger-than-Lollapalooza-sized NFL Draft. Once the Draft and its "all hands on deck" situation ended, the Local could handle the arena and outdoor shows without dipping as far down into the well as it had to during the focal period. And, when things picked up again in the summer, the Jam voters' referrals picked up, as well.

[11] Again, the conspiracy-theory suggestion that the Local gave the Jam voters referrals after the election to which they were not entitled, at the expense of its other referral hall participants, just to cover its tracks is unsupported by any actual facts. (Req. for Rev. at 44 n.20.)

The fact that the summer referral numbers examined by the Hearing Officer included work at the Aragon is irrelevant. Once the Aragon became signatory, Local 2 had one more venue to supply with available stagehands. If it were not a venue with a dedicated house crew, then the Riviera stagehands could and would have been referred anywhere, and the crews at the Aragon could and would have been staffed by whomever the call steward assigned there. The total numbers of referrals for the Local would not have changed. Admittedly, it is conceivable that an Aragon show could fall on an otherwise slow summer day and result in the dedicated Aragon house crew working when some of them otherwise have yielded to more experienced referral participants. But the data do not show whether this was the case, and there were in any event relatively few calls in the July and August records that reference the Aragon. (U. Ex. 4.) Given this context, the Hearing Officer's finding that the Jam voters worked more frequently in the summer than in the six weeks prior is not erroneous just because it included some Aragon calls.

Finally, Jam's contention that nine Jam stagehands were "fast-tracked" to membership in the fall of 2016 is true—but irrelevant. (Req. for Rev. at 45 n.20.) Carlson credibly explained that, when individuals come into the Union's orbit through an organizing campaign with demonstrated skills, experience, and commitment to the craft as a result of years spent working for a previously unrepresented employer, they may qualify for journeyman status just the same as other stagehands who had demonstrated those same qualities over the course of two to three years of regular work for signatory employers. (Tr. 295-97.) There is no evidence that any of the nine failed to meet these criteria. Their greater skills and experience explains why they received more referrals than some other Jam stagehands during the focal period. If Jam is now arguing that these stagehands' qualifications for membership in the fall of 2016 partly explain why they got more referrals in the summer, the same analysis applies with equal force during the focal period.

VII. The Regional Director appropriately applied the burden of proof.

Jam unquestionably failed to meet its heavy burden of proof in this case. Jam does not—and cannot—dispute the findings of the hearing officer that

> there is no evidence that Carlson requested Herrmann to give the Shaw Crew referrals to which they were not otherwise entitled, no evidence that the Shaw Voters connected the referrals to the vote, no evidence that ties the referrals to the election results, and no evidence that a Union member was bypassed to make way for a voter.

(Req. for Rev. at 45.) The Hearing Officer, and by extension the Regional Director, lists these shortcomings not because Jam was required to prove *all* of these facts in order to sustain its objection; he was simply pointing out that *none* of these possible indicia that the Union impermissibly interfered in the fair conduct of the election was present. Jam's burden was to prove that the Union impermissibly offered Jam stagehands who were eligible to vote referrals that they would not otherwise have offered but for the election.

Jam claims that Hearing Officer erroneously found that the "primary question for assessing the employer's objection is whether there is evidence that the Shaw voters were referred ahead of any *members*," effectively finding that Jam voters "were entitled to bump all of the other non-members vying for referrals, *i.e.*, go to the head of the line." (Req. for Rev. at 46 n.21.) The problem for Jam is that it did not prove that the latter occurred, either, for all the reasons discussed at length above and in the Union's briefing to the Region. If the Hearing Officer's phrasing was erroneous, it was harmless; Jam failed to meet its burden of demonstrating that, but for the election, any other stagehands would have received work but did not because it instead went to the Jam employees.

Jam finishes with a recitation of all of the claims discussed above, in which, rather than arguing for a "lowering" of the burden of proof, it actually attempts to shift the burden onto the Union. But Jam bore the burden of proving its own objection, and it simply failed to meet that burden. And assuming *arguendo* that the Union bore the burden of proving that the referrals for the Jam voters in the focal period were made in the ordinary course of the referral hall's operations, it has more than satisfied that burden. The evidence showed that, *when Jam fired them all*, many of the fired stagehands signed up for referrals from Local 2—thereby satisfying their duty under the Act to mitigate their damages, not to mention feeding their families—but that only the more experienced, senior members of the fired crew got much work, until things suddenly got very busy in April when the NFL Draft came to town and the Local went into an "all hands on deck" situation, even drawing in members of other locals to help it cover the available work. After the Draft left town, things slowed down again until the busy summer season. Before they were fired, when they still had jobs at Jam, they did not seek out work with other employers—just like the eligible voters from the Vic and Park West who retained their jobs through the critical period and did not seek work through the Local's referral hall. The referral numbers are consistent with this picture. In short, the evidence as a whole plausibly supports the conclusions that the Regional Director reached, which are therefore not clearly erroneous and do not raise any issue warranting review.

VIII. The instant case falls squarely within the Board's precedents and raises no novel issues requiring review.

This case raises no substantial questions of law or policy not already fully encompassed by the Board's precedents. Jam asserts that the referrals in the present case were wholly discretionary—a contention the Union disputes, as argued at length above. But even accepting this assertion *arguendo*, Jam's objection falls squarely within existing Board law. The question before the Regional Director was whether the Jam stagehands who received referrals through Local 2 during the critical period could and would have received them absent the election, assuming the same skill, industry experience, and availability. If they were fully eligible for the referrals they received, and they received no preferential or special treatment, then the Local conferred nothing of value on them—the Jam stagehands just got exactly what they would have gotten but for the election. The position Jam is advocating is that because of the election the Union had an affirmative obligation to *withhold* referrals that the Jam stagehands otherwise could have received. This is not what the Board's precedents hold.

The Board has repeatedly found that a union acts objectionably when it lowers an existing barrier to receipt of a benefit during the critical period, thereby making the benefit available to voters who, but for the exception the union has made, would not otherwise have been able to receive it. Thus, where referrals to other signatory contractors through a joint apprenticeship training committee were ordinarily available only to existing employees of signatory contractors, the union acted objectionably when it lowered the barrier to access those referrals and let the voters participate. *King Elec., Inc. v. NLRB*, 440 F.3d 471, 475-76 (D.C. Cir. 2006). It does not matter whether access to the referrals was a right or "entitlement" for those who ordinarily received them; the objectionable conduct came in granting the voters access they otherwise would not have had.

When a union decided to waive back dues owed by members of the bargaining unit in a decertification election, it lowered such a barrier. But for the union's waiver decision, the members would, as they had up until that decision was made on the eve of the election, still have owed the money and faced the consequences of their debt, like any other member that owed the union money. *Go Ahead N. Am., Inc.*, 357 NLRB 77, 78 (2011).

Where ordinarily only union members were eligible to receive a life insurance policy, a union acted objectionably when it instead made the policy available to voters who were not yet members. *Wagner Elec. Corp.*, 167 NLRB 532, 533 (1967).

And when a union brought two vans to the employer's premises two days before the election to do free health screenings that it ordinarily provided only to employees in bargaining units it already represents, it lowered a barrier to access to that benefit solely on the basis of the individuals' status as voters. *Mailing Servs., Inc.*, 293 NLRB 565 (1989). The Board expressly noted that the record did not reflect whether the tests were provided to all represented employees regardless of membership, or were otherwise made available to union members generally, (*Id.* at 565 n.1); it is not technical "entitlement" to the benefit that matters, but the granting of otherwise unavailable access to the voters.

Finally, when a union lowered an existing barrier to accessing mechanics' cards for a group of voters by eliminating required coursework and exams, it acted objectionably. *River City Elevator*, 289 F.3d at 1033.

The present case presents very different circumstances. The Regional Director found, in a decision that Jam has failed to demonstrate was clearly erroneous, that the Union made no special exceptions for the Jam voters, lowered no existing barriers to access to referrals, gave them no preferential treatment. In these circumstances, the Union is not obligated to *withhold* benefits that would otherwise be available to voters just because they are voters. For example, where a union's extant, normal practice was to issue apprentice cards to the employer's employees after one year of service, issuing them to voters in a representation proceeding who met that criterion did not represent a lowering of any otherwise existing barrier to receiving the benefit. *NLRB v. Chicago Tribune Co.*, 943 F.3d 791, 797 (7th Cir. 1991). The conduct was not objectionable, because the union just treated the voters according to its usual practice, effecting "no change in the status quo." *Id.* The Board found no affirmative obligation by the Union to *alter* the status quo by withholding the cards because of the pending election. Because the Union treated Jam voters no differently when it came to referrals than "others of like standing," the Regional Director properly found under existing Board precedents that the union did not act objectionably. *Topside Constr., Inc.*, 329 NLRB 886, 899 (1999).

This is the same logic that governs employer behavior in the critical period. An employer that, for instance, has always held an annual picnic for its employees would be under no obligation to forego the picnic just because a representation petition had been filed. Going ahead and holding the picnic is not "giving" the employees anything they would not otherwise have gotten; on the contrary, it maintains the status quo. *See, e.g., Reno Hilton Resorts Corp.*, 319 NLRB 1154, 1172 (1995). Indeed, an employer is *expected* to continue acting as it would in the absence of an organizing campaign. *See, e.g., Network Ambulance Servs., Inc.*, 329 NLRB 1, 2 (1999). In that case, in the absence of evidence contradicting the employer's testimony that granting voters additional floating holidays was part of a corporate-wide rollout timed to the end of its fiscal year and affecting employees throughout the company, not just the bargaining unit, there was no evidence that the benefit was calculated to influence the election, and it was not objectionable. Absent an announcement that the employer was temporarily deferring the benefit until after the election, the general rule is that "the employer is required to proceed with projected wage or benefit improvements as if the union were not on the scene." *Id.*

In the present case, the Union simply continued to apply its referral criteria as usual, in the same way for the Jam voters as for everyone else, and in the same way before, during, and after the critical period. That is, the Union "gave" the Jam stagehands nothing they could or would not otherwise have gotten; rather, it maintained the status quo. The fact that the call steward exercised discretion in the application of the Local's referral criteria changes nothing—and certainly does not create a need for new or different guidance from the Board—because the exercise of discretion *was* the status quo: he exercised that discretion in the same way for the Jam voters as for everyone else, and in the same way before, during, and after the critical period. The Union does not deny what the evidence plainly shows: the Jam stagehands received referrals; those referrals increased in number when the Union got busy before the election; and employees working under the Union's collective-bargaining agreements earn a good living. But just going about its business of filling calls according to the same criteria as always, without regard to an individual's status as a Jam employee, is not "giving" Jam voters anything, and therefore in principle is not an improper inducement that could coerce them to vote for the Union.

In short, the evidence fully supported the Regional Director's finding that the Union treated the Jam stagehands no differently when it came to referrals than others of like standing. There was no lowering of any existing barriers required for the Jam employees to receive the referrals they received. There was no preferential treatment, no adjustment of the referral criteria, no special consideration given, no change in the status quo of its existing referral practices. The Jam stagehands who had signed up for referrals received them according to the same criteria as everyone else. Because the Local was so busy in April and May 2016, treating the Jam stagehands the same as everyone else meant an increase in referrals in the six weeks before the election—as it did for their similarly situated peers. The increased referrals are not a thing of value "given" to the Jam employees that they would not have otherwise received in the absence of the pending election. Existing Board law did not require the Union to alter the status quo and take the affirmative step of making an exception to its normal referral practices to bar the Jam voters from referrals *just because they were Jam voters*. No new or special guidance from the Board is required to find that the Union engaged in no objectionable conduct, and the Regional Director properly overruled Jam's objection. Jam's request for review should be denied.

Respectfully submitted,

/s/ David Huffman-Gottschling
One of Petitioner's Attorneys

David Huffman-Gottschling
Jacobs, Burns, Orlove & Hernandez
150 N. Michigan Ave., Ste. 1000
Chicago, IL 60601

davidhg@jbosh.com
(312) 327-3443

CERTIFICATE OF SERVICE

I, David Huffman-Gottschling, an attorney, certify that I caused a copy of the foregoing document to be served upon the following persons by email pursuant to Sections 102.67(i)(2) and 102.114(a) of the Board's Rules and Regulations on October 18, 2019:

Steven Gillman Holland & Knight LLP 131 S. Dearborn St., 30th Fl. Chicago, IL 60303	Peter Ohr, Regional Director NLRB Region 13 219 S. Dearborn St., Ste. 808 Chicago, IL 60604
steven.gillman@hklaw.com	peter.ohr@nlrb.gov

/s/ David Huffman-Gottschling

David Huffman-Gottschling